Transwater Tenaga Sdn Bhd v Aps Technologies Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–195 OF 2004
MOKHTAR SIDIN, AZMEL AND ZULKEFLI JJCA
24 NOVEMBER 2006

Contract — Offer and acceptance — Offer and counter offer — Request to resubmit 'an escalated quotation' — Whether a counter offer or a mere request

Tort — Inducement of breach of contract — Indirect interference — Elements of the tort

This was an appeal by the defendant against the decision of the learned judge of the High Court in allowing the first and the second plaintiffs' claims on the issue of liability against the defendant. The first plaintiff's claim against the defendant was for breach of contract. The second plaintiff's claim against the defendant was for damages for wrongful inducement and procurement of breach of contract. The second plaintiff contended that it had entered into a contract with Malaysian Airlines System ('MAS') for the Gas Reticulation System Works ('GRSW') for the Kuala Lumpur International Airport. The second plaintiff also contended that they had sub-contracted the construction of the Gas Metering Station ('GMS') which formed part of the GRSW to the first plaintiff. There were a series of negotiations between the plaintiffs and the defendant. On 14 January 1998, the defendant made an offer to the first plaintiff with a validity period of one week. On 19 January 1998, there was a meeting between the representatives of the first plaintiff and the defendant where the defendant alleged that at the said meeting, the first plaintiff's representative had specifically requested that the defendant 'escalate' the contract price under their quotation of 14 January 1998. It was not disputed that on 20 January 1998, the defendant met MAS to discuss MAS's intention to award the GRSW to the defendant. Neither plaintiffs were informed of the meeting whether before or after the event. On 21 January 1998, the first plaintiff wrote to accept the defendant's offer of 14 January 1998. On the same day the defendant also issued a letter to the first plaintiff declining to resubmit 'an escalated quotation' which they submit tantamounts to revoking their offer of 14 January 1998. The appeal was based substantially on two main issues. Firstly, in relation to the first plaintiff whether there was a binding contract reached between the defendant and the first plaintiff. Secondly, in relation to the second plaintiff whether the learned High Court judge was right in holding that the defendant had induced a breach of the alleged contract between the second plaintiff and MAS for the GRSW.

Held, dismissing the appeal:

(1) The dispute centered on the defendant's allegation that the first plaintiff had requested the defendant to resubmit 'an escalated quotation' on the contract price for the GMS. It was the defendant's contention that the first plaintiff's request was treated as a counter offer and by the said request the defendant's offer of 14 January 1998 was neutralized and was no longer capable of acceptance. On the evidence adduced before the learned trial judge, he was right in concluding that there was no request for the defendant to allegedly resubmit an 'escalated quote'. The learned trial judge was justified in stating that it made no logical commercial sense for the first plaintiff to have asked the defendant to resubmit an escalated quotation. An escalated quote from the defendant would have reduced the profit margin of the first plaintiff. There was also no other explanation proffered by defendant as to why the first plaintiff would want the defendant to escalate its quotation (see paras 9 & 10).

(2) Assuming that there was a request by the first plaintiff to quote an escalated cost, by law it remained a request and not a counter-offer as proffered by the defendant. There is nothing specific by way of a counter-offer made but a mere request which cannot be treated as a rejection of the defendant's offer of 14 January 1998. In the context of this case, it may only be argued that a counter-offer was made by the first plaintiff to the defendant if the first plaintiff had specified a contract price to counter the defendant's offer. However in the present case the first plaintiff had not done so (see para 13).

(3) It was not disputed that MAS had intended the GMS works to be contracted to the defendant. There was no dispute that negotiations had commenced and ended with the award of the GMS works to the defendant. If the defendant had ultimately been awarded the GMS works by the first plaintiff as approved and intended by MAS, it matters not whether the first plaintiff was in a position to sub-contract the works to the defendant. The defendant argued that the first plaintiff was allegedly not pre-qualified by MAS or that MAS' approval was not sought. That issue was not relevant in the present dispute between the plaintiffs and defendant. That might have been an issue between MAS and the plaintiffs but did not affect the binding contract between the first plaintiff and defendant (see para 18).

(4) It was to be noted that MAS had in fact compensated the second plaintiff for omitting the GRSW from it. If MAS had in fact compensated the second plaintiff for omitting the GRSW then there is no issue as to whether MAS had pre-qualified the first plaintiff. Besides, it was the GMS works that were sub-contracted to the first plaintiff and not the entire GRSW. If the defendant knew that it would be the first plaintiff to award the GMS works then the chain of awarding the works was never broken and was legally sustainable (see paras 19 & 20).

(5) By entering into an agreement to do the GRSW with MAS, the defendant must have intended to cause MAS to breach its contract with the second

plaintiff. The defendant in fact knew that if MAS awarded the entire GRSW to the defendant, MAS would have to omit the GRSW from the second plaintiff. The defendant's knowledge forms the unlawful element to infer 'indirect interference'. Malice is not required in the defendant's act. It does not matter that MAS might have been a willing party to the breach without the defendant's initiation. The 'wrongful' element is established in the light of MAS' breach, which is an unlawful act. The defendant is also deemed to have acted unlawfully as it had induced or procured MAS to breach such contract without just cause or excuse. The allegation that MAS had a discretion to award or omit the GRSW is a total misconception and cannot stand as a justification. MAS already had a firm contract with the second plaintiff on the GRSW before it was awarded to the defendant (see para 24).

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh defendan terhadap keputusan hakim bijaksana mahkamah tinggi membenarkan tuntutan plaintif pertama dan kedua di atas isu liabiliti terhadap defendan. Tuntutan plaintif pertama terhadap defendan adalah untuk kemungkiran kontrak. Tuntutan plaintif kedua terhadap defendan adalah untuk ganti rugi kesalahan dalam pendorongan dan pemerolehan kemungkiran kontrak. Plaintif kedua menyatakan bahawa ia telah memasuki satu kontrak dengan Malaysian Airlines System ('MAS') untuk Gas Reticulation System Works ('GRSW') bagi Lapangan Terbang Antarabangsa Kuala Lumpur. Plaintif kedua juga menyatakan bahawa mereka telah subkontrak pembinaan Gas Metering Station ('GMS') yang membentuk sebahagian daripada GRSW kepada plaintif pertama. Terdapat beberapa rundingan di antara plaintif-plaintif dan defendan. Pada 14 Januari 1998 defendan membuat satu tawaran kepada plaintif pertama dengan tempoh sah selama satu minggu. Pada 19 Januari 1998 terdapat satu mesyuarat di antara wakil-wakil plaintif pertama dan defendan dimana defendan menyatakan bahawa pada mesyuarat tersebut, wakil plaintif pertama telah secara khususnya memohon defendan 'menaikkan' harga kontrak di dalam surat tawaran mereka bertarikh 14 Januari 1998. Tidak dipertikaikan pada 20 Januari 1998, defendan telah menemui MAS untuk membincang hasrat MAS untuk mengawardkan GRSW kepada defendan. Plaintif-plaintif tidak dimaklumkan akan mesyuarat ini samada sebelum atau selepas mesyuarat tersebut. Pada 21 Januari 1998 plaintif pertama menulis kepada defendan menerima tawaran defendan bertarikh 14 Januari 1998 tersebut. Pada hari yang sama defendan juga mengeluarkan satu surat kepada plaintif pertama keengganan mereka menyerahkan sekali lagi 'satu sebut harga yang lebih tinggi' yang mana mereka menghujahkan sebagai membatalkan tawaran mereka yang bertarikh 14 Januari 1998 tersebut. Rayuan ini berdasarkan sebahagian besarnya atas dua isu utama. Pertama, berhubung dengan plaintif pertama samada terdapat satu kontrak terikat di antara defendan dengan plaintif pertama. Keduanya, berhubungan dengan plaintif kedua samada hakim mahkamah tinggi yang bijaksana betul di dalam memutuskan bahawa defendan telah mendorong satu kemungkiran kontrak yang dikatakan wujud di antara plaintif kedua dan MAS untuk GRSW.

A

Diputuskan, menolak rayuan tersebut:

(1) Pertikaian berpusat atas alegasi defendan bahawa plaintif pertama telah meminta defendan menyerahkan sekali lagi 'satu sebut harga yang lebih tinggi' atas harga kontrak untuk GMS. Adalah hujahan defendan bahawa permintaan plaintif pertama dijadikan sebagai satu tawaran-balas dan melalui permintaan tersebut tawaran defendan bertarikh 14 Januari 1998 tersebut telah dijadikan tidak berkesan dan tidak dapat dijadikan suatu tawaran yang boleh diterima. Berdasarkan bukti yang diberikan sebelum hakim perbicaraan yang bijaksana, beliau betul dalam memutuskan bahawa tiada permintaan untuk defendan menyerahkan sekali lagi satu 'sebut harga yang lebih tinggi'. Hakim perbicaraan yang bijaksana juga betul dalam menyatakan bahawa ia tidak memberikan sebarang logik dari segi komersil untuk plaintif pertama meminta defendan menyerahkan sekali lagi satu sebut harga yang lebih tinggi. Satu sebut harga yang lebih tinggi daripada defendan hanya akan mengurangkan margin keuntungan plaintif pertama. Tiada sebarang penjelasan juga diberikan oleh defendan kenapa plaintif pertama mengkehendaki defendan menaikkan sebut harganya (lihat perenggan 9–10).

(2) Sekiranya terdapat satu permintaan sedemikian oleh plaintif pertama untuk menaikkan kosnya, dalam undang-undang ia tetap satu permintaan dan bukan tawaran balas seperti yang dinyatakan oleh defendan. Tiada apa-apa spesifik dalam tawaran balas yang dibuat tersebut tetapi hanya satu permintaan dimana ia tidak boleh dijadikan sebagai satu penolakan tawaran defendan yang bertarikh 14 Januari 1998. Dalam konteks kes ini, ia hanya boleh dikatakan satu tawaran balas dibuat oleh plaintif pertama kepada defendan sekiranya plaintif pertama membutirkan harga kontrak untuk membalas tawaran defendan. Akan tetapi dalam kes ini, plaintif pertama tidak berbuat demikian (lihat perenggan 13).

(3) Adalah tidak dipertikaikan bahawa MAS berhasrat untuk kerja-kerja GMS dikontrak kepada defendan. Tiada pertikaian bahawa rundingan telah bermula dan berakhir dengan kontrak kerja-kerja GMS diawardkan kepada defendan. Sekiranya defendan pada akhirnya diawardkan kerja-kerja GMS oleh plaintif pertama seperti yang dipersetujui dan dikehendaki oleh MAS, ia tidak menjadi isu samada plaintif pertama layak untuk subkontrak kerja-kerja tersebut kepada defendan. Defendan telah berhujah bahawa plaintif pertama dikatakan tidak pra-dilayakkan oleh MAS atau persetujuan MAS tidak dipohon. Isu tersebut tidak penting dalam pertikaian ini di antara plaintif-plaintif dan defendan. Itu kemungkinan satu isu di antara MAS dan plaintif-plaintif tetapi tidak menjejaskan kontrak terikat di antara plaintif pertama dan defendan (lihat perenggan 18).

(4) Ia patut diperhatikan bahawa MAS sebenarnya telah memberi pampasan kepada plaintif kedua kerana meninggalkan GRSW daripadanya. Jika MAS sebenarnya telah memberi pampasan kepada plaintif kedua kerana meninggalkan GRSW maka tiada isu samada MAS telah pra-layakkan plaintif pertama. Tambahan pula, ia adalah kerja-kerja GMS yang disubkontrakkan

kepada plaintif pertama dan bukannya keseluruhan GRSW. Jika defendan tahu bahawa ia adalah plaintif pertama yang mengawardkan kerja-kerja GMS kepadanya, maka rantai mengawardkan kerja-kerja tidak dipecahkan dan dikekalkan mengikut undang-undang (lihat perenggan 19–20).

(5) Dengan memasuki satu perjanjian untuk membuat GRSW tersebut dengan MAS, defendan semestinya menginginkan MAS memungkirkan kontraknya sendiri dengan plaintif kedua. Defendan sebenarnya tahu bahawa jika MAS mengawardkan keseluruhan GRSW kepada defendan, MAS akan meninggalkan GRSW daripada plaintif kedua. Pengetahuan defendan membentuk elemen untuk membuat inferens 'indirect intereference'. Niat jahat tidak diperlukan di dalam tindakan defendan. Ia tidak material jika MAS berkemungkinan adalah pihak yang sanggup memungkirkan tanpa pendorongan defendan. Elemen 'kesalahan' telah ditubuhkan disebabkan oleh kemungkiran MAS, dimana ia adalah perbuatan yang menyalahi undang-undang. Defendan juga dianggap telah bertindak menyalahi undang-undang oleh kerana ia telah mendorong dan memperolehkan MAS memungkiri kontrak tanpa sebab atau alasan yang adil. Alegasi bahawa MAS mempunyai budibicara dalam mengawardkan atau meninggalkan GRSW adalah satu salah konsep dan tidak boleh berdiri sebagai satu justifikasi. MAS telahpun mempunyai satu kontrak dengan plaintif kedua atas GRSW sebelum ia diawardkan kepada defendan (lihat perenggan 24).]

Notes

For a case on offer and counter offer, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3973.

For cases on indirect interference generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 552–555.

Cases referred to

Greig v Isole [1978] 3 All ER 449 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

South Wales Miners' Federation & Others v Glamorgan Coal Company Limited & Ors [1905] AC 239 (refd)

Stevenson, Jaques & Co v McLean (1880) 5 QBD 346 (refd)

Appeal from: Civil Suit No S1–22–761 of 2000 (High Court, Kuala Lumpur)

Romesh Abraham (Katheleen Nunis with him) (Shook Lin & Bok) for the appellants.
WM Chang (HL Chan) (Raja Darryl & Loh) for the respondents.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the defendant against the decision of the learned Judge of the High Court in allowing the first and the second plaintiffs' claims on the issue of

liability against the defendant. The first plaintiff's claim against the defendant is for breach of contract. The second plaintiff's claim against the defendant is for damages for wrongful inducement and procurement of breach of contract. Having allowed the claims of the first and second plaintiffs with costs, the learned trial judge directed the Senior Assistant Registrar to proceed to assess damages.

BACKGROUND

[2] The relevant background facts of the case are as follows:

(i) The second plaintiff contended that it had entered into a contract with Malaysian Airlines System ('MAS') for the Gas Reticulation System Works ('GRSW') for the Kuala Lumpur International Airport. The second plaintiff also contended that they had sub-contracted the construction of the Gas Metering Station ('GMS') which formed part of the GRSW to the first plaintiff.

(ii) Sometime in June 1997, the second plaintiff approached the defendant in order to sub-contract the construction of the GMS to the defendant.

(iii) The defendant and the second plaintiff then went through a series of negotiations on the terms of the contract for the GMS over the period of June 1997 to December 1997. In December 1997, the first plaintiff in place of the second plaintiff continued with the negotiations with the defendant.

(iv) The defendant and the first plaintiff were unable to come to an agreement on several material terms and in particular in relation to the contract sum and the terms of payment.

(v) In January 1998, the defendant informed the first plaintiff that the defendant was no longer interested in the contract for the construction of the GMS. Nevertheless the defendant alleged in view of the request by the first plaintiff, the defendant had agreed to furnish the first plaintiff with a final quotation for the GMS. The defendant forwarded its final quote in a letter dated 14 January 1998 to the first plaintiff with the condition that the first plaintiff was to respond to the same within a week of the date thereof (ie on or before 21 January 1998).

(vi) On or about 19 January 1998 there was a meeting between representatives of the first plaintiff, one Dato Perumal A Pikiri (PW1) and the defendant regarding the negotiations for the GMS. The defendant alleged that at the said meeting, the first plaintiff's representative had specifically requested that the defendant 'escalate' the contract price under their quotation of 14 January 1998.

(vii) The defendant alleged that as it was not agreeable to such a price 'escalation', a representative of the defendant, one Chung Loong Chye (DW1) thereafter spoke to the said Dato Perumal (PW1) of the first plaintiff on 20 January 1998 and informed him that the defendant would not escalate the contract price and was no longer interested in negotiating with the first plaintiff for the GMS.

(viii) The defendant then issued a letter dated 21 January 1998 to the first plaintiff informing the first plaintiff of its above decision. The first plaintiff in the meanwhile also purported to send a letter dated 21 January 1998 to the defendant by facsimile seeking to accept the defendant's quotation of 14 January 1998.

(ix) In response to the first plaintiff's letter dated 21 January 1998, the defendant issued a letter to the first plaintiff dated 22 January 1998 whereby the defendant confirmed that the defendant was no longer interested in the GMS and had withdrawn its quotation of 14 January 1998.

(x) On or about 26 January 1998, the defendant received an award for the GRSW from MAS.

ISSUES BEFORE THE COURT

[3] The appeal herein is based substantially on two main issues which are as follows.

[4] Firstly, in relation to the first plaintiff the issue is whether there was a binding contract reached between the defendant and the first plaintiff in relation to the GMS either orally or in writing. It is the defendant's contention that the first plaintiff's letter of 21 January 1998 did not give rise to any contract. The learned trial judge made a finding that there was a binding contract which came into existence between the first plaintiff and the defendant on 21 January 1998.

[5] Secondly, in relation to the second plaintiff the issue is whether the learned High Court judge was right in holding that the defendant had induced a breach of the alleged contract between the second plaintiff and MAS for the GRSW.

Whether there was a binding contract reached between the defendant and the first plaintiff either orally or in writing

[6] It is the defendant's case that there was no contract concluded between the first plaintiff and the defendant. Learned Counsel for the defendant in his argument before us submitted that the whole of the correspondence between the parties from June 1997 to January 1998 showed a series of negotiations and re-negotiations without any clear consensus on the essential terms of a contract. What was important was for the court to consider the whole of the correspondence and to decide if the parties had agreed on the same terms.

[7] The relevant question to be decided is whether the defendant's letter of 14 January 1998 was accepted by the first plaintiff and thereby constituted a valid and binding contract between the parties as held by the learned trial judge. In my view, there is no dispute that the defendant's letter of 14 January 1998 was its offer to the first plaintiff with a validity period of one week from the date of the letter. There is no dispute that the first plaintiff's letter dated 21 January 1998

unconditionally accepted the defendant's offer of 14 January 1998. There is further no dispute that by its letter of 22 January 1998 the first plaintiff furnished a cheque of a sum of RM160,500 to the defendant for the 30% portion of the contract price as advance payment for the GMS works (see pp 454–456 of the Appeal Record (Vol 2)). This term was one of the terms offered by the defendant and accepted and acted upon by the first plaintiff. In this case what is in dispute is whether the defendant had revoked its offer of 14 January 1998 as a result of the following intervening events:

(i) the meeting on 19 January 1998 between the representatives of the first plaintiff and the defendant and the alleged telephone conversation between PW1 and DW1 on 20 January 1998; and

(ii) the defendant's letter of 21 January 1998 to the first plaintiff.

[8] The first plaintiff's contention is that there is no revocation of the defendant's offer of 14 January 1998. The learned trial judge agreed with this contention and rejected the defendant's contention.

[9] The dispute centers on the defendant's allegation that the first plaintiff had requested the defendant to resubmit 'an escalated quotation' on the contract price for the GMS. For the defendant it was argued that in a meeting on 19 January 1998 the first plaintiff had allegedly requested the defendant to submit an 'escalated quote'. The defendant allegedly declined to do so by its letter of 21 January 1998. It is the defendant's contention that the first plaintiff's request was treated as a counter offer and by the said request the defendant's offer of 14 January 1998 was neutralized and was no longer capable of acceptance.

[10] On the evidence adduced before the learned trial judge, I find that he was right in concluding that there was no request for the defendant to allegedly resubmit an 'escalated quote'. The learned trial judge was justified in stating that it makes no logical commercial sense for the first plaintiff to have asked the defendant to resubmit an escalated quotation. PW1's testimony was preferred in that an escalated quote from the defendant would have reduced the profit margin of the first plaintiff. The evidence given by PW1 in explanation that an escalated quote would reduce the profit margin of the first plaintiff was not challenged at cross-examination. There is also no other explanation proffered by defendant as to why the first plaintiff would want the defendant to escalate its quotation.

[11] It is also to be noted that the proposition to 'escalate the quote' came about abruptly and at a time so close to the expiry of the defendant's offer of 14 January 1998. The plaintiffs and the defendant have been in negotiations since June 1997 onwards. It is my considered view that to request the defendant to suddenly 'escalate its quote' two days before the expiry of the defendant's offer of 14 January 1998 and several months after they have been negotiating is illogical and highly improbable. The timing of the defendant's letter dated 21 January 1998 in the light of the

undisputed events occurring at the same time would also appear to make the defendant's letter highly suspect. These undisputed events may be chronologically set out as follows:

(i) On 14 January 1998, the defendant made an offer to the first plaintiff by its letter of the same date. The letter had a validity period of one week.

(ii) On 19 January 1998, there was a meeting between the representatives of the first plaintiff and the defendant.

(iii) On 20 January 1998 at about 3pm, the defendant met MAS to discuss MAS's intention to award the GRSW to the defendant. Neither plaintiffs were informed of the meeting whether before or after the event.

(iv) On 21 January 1998, the defendant promptly submitted its five page proposal for the GRSW at a price of RM2.5m to MAS. The defendant was no doubt enticed by the whopping increase of income from RM535,000 (under a contract with the first plaintiff) to RM2.5m (under a contract with MAS) albeit for a bigger scope of works.

(v) On 21 January 1998 when the defendant made the RM2.5m offer to MAS, the first plaintiff wrote to accept the defendant's offer of 14 January 1998. On the same day the defendant also issued a letter to the first plaintiff declining to resubmit 'an escalated quotation' which they submit tantamount to revoking their offer of 14 January 1998.

[12] I would venture to state that by the events that took place on 21 January 1998 whereby the defendant made their offer to MAS and receiving the first plaintiff's acceptance, the defendant realized that they could not contract with two persons for the same works. This prompted the defendant to despatch the letter declining to resubmit 'an escalated quotation' and was an attempt to sever all ties with the first plaintiff. The defendant submitted that the rejection by the defendant of the plaintiff's request to escalate the price quotation meant that the negotiations ceased and there was no contract.

[13] Assuming that there was a request by the first plaintiff to quote an escalated cost, by law it remained a request and not a counter-offer as proffered by the defendant. I find there is nothing specific by way of a counter-offer made but a mere request which cannot be treated as a rejection of the defendant's offer of 14 January 1998. In my view, in the context of this case, it may only be argued that a counter-offer was made by the first plaintiff to the defendant if the first plaintiff had specified a contract price to counter the defendant's offer (see the case of *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346). However, in the present case, the first plaintiff had not done so.

[14] A literal and clear reading of the defendant's letter of 21 January 1998 to the first plaintiff would indicate that it did not express or communicate an unequivocal intention to 'revoke' the offer of 14 January 1998. It merely stated and reproduced as follows:

> Thank you for your request of meeting on the 19th January 1998 and notes APS's request for Transwater resubmitting an escalated quotation for this project. We have discussed this with our management team and regret to inform your company that we are unable to comply and hence wish to decline the offer.

(See p 453 of the Appeal Record (Vol 2))

[15] This letter did not express that the defendant 'were no longer interested in the project' as contended in the defendant's submissions before the learned trial judge. Further, it is noted that the defendant's amended defence did not plead that their letter dated 21 January 1998 revoked their earlier offer of 14 January 1998. Hence, it is my view that the defendant cannot rely on that letter to claim that its offer of 14 January 1998 was purportedly 'revoked'. In my judgment considering the fact that defendant's offer of 14 January 1998 remained and that the first plaintiff had accepted the offer within the stipulated period, a valid and binding contract is formed between them. In any event, PW1 claimed that he had faxed the plaintiff's letter on 21 January 1998 before he received the defendant's letter of the same date. This is marked by the hand-written notation on the first plaintiff's letter of 21 January 1998. Had PW1 received the defendant's letter on 21 January 1998 first, it makes no sense for PW1 to send out the first plaintiff's letter of the same date and that on 22 January 1998, a letter enclosing the first plaintiff's cheque to the defendant. It is noted both the letters dated 21 January 1998 and 22 January 1998 did not indicate that the first plaintiff had received the defendant's letter of 21 January 1998 as alleged by the defendant.

[16] The defendant's own documents including an admission from DW1 would also confirm that the defendant had already partly performed the GMS works to evince that a legally binding contract had existed, the execution of which had commenced between the inter alia as follows: first plaintiff and defendant. On this point, the court needs look no further than DW1's admission when he stated in cross-examination after being shown a project schedule (encl 26), inter alia, as follows:

> Refer to Enclosure 26, p 146.
>
> 75. Q. This is your letter to the 1st plaintiff. I put it to you that the 3 terms ie 'kick off meeting', 'overall project [completion]', 'percent completed' are used only after a contract has been awarded and after works have commenced.
>
> A. Yes.

(See page 244 of Appeal Record (Vol. 1))

[17] By the above admission, the defendant agreed that the plaintiff had awarded the contract to the defendant and that the defendant had commenced works. The inevitable conclusion is that if the defendant had submitted a detail project schedule then the project must have been awarded. In the parties' minds the GMS works must have already been awarded to the defendant by the first plaintiff.

Whether the first plaintiff was in a position to sub-contract the relevant GMS Contract to the defendant

[18] The defendant submitted that the learned trial judge erred in law and in fact in failing to properly consider the evidence as to whether the first plaintiff was in a position to sub-contract the relevant GMS works to the defendant so as to institute and maintain the claim for breach of contract. It is not disputed that MAS had intended the GMS works to be contracted to the defendant. There is no dispute that negotiations had commenced and ended with the award of the GMS works to the defendant. In my view if the defendant had ultimately been awarded the GMS works by the first plaintiff as approved and intended by MAS, it matters not whether the first plaintiff was in a position to sub-contract the works to the defendant.

[19] The defendant argued that the first plaintiff was allegedly not pre-qualified by MAS or that MAS' approval was not sought. To my mind that issue is not relevant in the present dispute between the plaintiffs and defendant. That may have been an issue between MAS and the plaintiffs but does not affect the binding contract between the first plaintiff and defendant. It is to be noted that MAS had in fact compensated the second plaintiff for omitting the GRSW from it. The defendant is also found to have known that the contract for the GMS works would come from the first plaintiff. On this point DW1 for the defendant in cross-examination had, inter alia, stated as follows:

> 22. Q. The defendant states that they appear to be some confusion whether the defendant was negotiating with the 1st plaintiff or the 2nd plaintiff wrote to the defendant. plaintiff. When was the 1st time the 1st plaintiff wrote to the defendant.
>
> Letter in page 116 of Enclosure 26 dated 5.12.97.
>
> 25. Q. I put it to you that there was no confusion as to whom the defendant was negotiating with after 5.12.97.
>
> A. I agree.
>
> 26. Q. When the defendant was negotiating with the 2nd plaintiff, the defendant dealt with PW1?
>
> A. Yes.
>
> 27. Q. Did the defendant also deal with PW1 when they were negotiating with the 1st plaintiff.
>
> A. Yes.
>
> 28. Q. I put it to you that the defendant must have known that the 1st and 2nd plaintiff were related companies.
>
> A. Yes.
>
> 29. Q. I put it to you that the defendant knew that the contract for the GMS works would come either from the 2nd or the 1st plaintiff.
>
> A. Yes.

(See pp 234-235 of Appeal Record (Vol.1))

[20] It is my considered view that if MAS had in fact compensated the second plaintiff for omitting the GRSW then there is no issue as to whether MAS had pre-qualified the first plaintiff. Besides, it was the GMS works that were sub-contracted to the first plaintiff and not the entire GRSW. If the defendant knew that it would be the first plaintiff to award the GMS works then the chain of awarding the works was never broken and is legally sustainable.

Whether there was an inducement for breach of contract entitling the second plaintiff to claim against the defendant

[21] The learned trial judge had rightly stated that to succeed in a claim of inducement of breach of contract five conditions must be satisfied. This is as set out in the case of *Greig v Isole* [1978] 3 All ER 449 and accepted by our Federal Court in the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105. They are inter alia as follows:

(a) There must be direct or indirect interference, coupled with the use of unlawful means.

(b) The defendant must be shown to have knowledge of the relevant contract.

(c) The defendant must be shown to have the intent to interfere.

(d) The plaintiff must show that he has suffered special damages, that is, more than nominal damages.

(e) So far as it is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

[22] To establish their claim, the plaintiffs have to prove first that MAS had breached its contract with the second plaintiff and that there existed elements of wrongful inducement or procurement when the GRSW were omitted from the second plaintiff and awarded to the defendant. It is not disputed that MAS was in breach of its contract with the second plaintiff. MAS had duly compensated the second plaintiff for omitting the GRSW from them.

[23] Based on the evidence adduced at the trial, I find that the learned High Court Judge was right in holding that the defendant had induced a breach of the alleged contract between the second plaintiff and MAS for the GRSW. The undisputed sequence of events in the present case point to the defendant and MAS meeting and negotiating covertly without the second plaintiff's knowledge for the GRSW even before the works were omitted from the second plaintiff and whilst the defendant was still talking with the first plaintiff on the GMS works which formed part of the GRSW. The defendant even submitted its tender for the GRSW before it was omitted from the second plaintiff. Consequently such actions had caused the GRSW being omitted from the second plaintiff and with MAS awarding the entire GRSW to the defendant. The defendant's inducement had directly caused MAS to omit the GRSW from the second plaintiff and this had caused losses to the second plaintiff.

[24] It is my considered view that by entering into an agreement to do the GRSW with MAS, the defendant must have intended to cause MAS to breach its contract with the second plaintiff. The defendant in fact knew that if MAS awarded the entire GRSW to the defendant, MAS would have to omit the GRSW from the second plaintiff. The defendant's knowledge forms the unlawful element to infer 'indirect interference'. Malice is not required in the defendant's act. It does not matter that MAS might have been a willing party to the breach without the defendant's initiation. The 'wrongful' element is established in the light of MAS' breach, which is an unlawful act. The defendant is also deemed to have acted unlawfully as it had induced or procured MAS to breach such contract without just cause or excuse (see the case of South Wales Miners' Federation & Others v. Glamorgan Coal Company Limited & Ors [1905] AC 239 (HL)).

[25] I find that the defendant afforded no proper justification for the wrongful inducement. Its allegation that MAS had a discretion to award or omit the GRSW is a total misconception and cannot stand as a justification. MAS already had a firm contract with the second plaintiff on the GRSW before it was awarded to the defendant. The allegation that the second plaintiff delayed the GRSW is unfounded. The delay if any did not in any event give the defendant a right to interfere. MAS in fact granted the second plaintiff an extension of time to complete the project, did not claim damages against them and paid compensation for actual works done and loss of profit.

[26] The defendant has also raised as a ground of appeal that the learned trial judge erred in law in not granting the defendant an opportunity to call a material witness from MAS in relation to the second plaintiff's claim of inducement for breach of contract. From the evidence recorded, it is not a fair inference for the defendant to state that the learned trial judge denied the defendant the opportunity to call its material witness. It was the defendant who was not ready to call and made available that so-called material witness at that stage of the hearing before the learned trial judge. On this point, the learned trial judge had stated in his Grounds of Judgment as follows:

> At the final stage of the trial, the defendant informed this Court that a representative from MAS would be called. But when requested by this Court to call such witness no one from such organization came forward to present his evidence. The only explanation offered by the defence counsel for the non-availability of such a witness was that 'he (the defence counsel) just received instructions. This of course is appalling since the presence of such witness should have been arranged long before trial and not left to the last hour to ascertain whether such witness was necessary.

(See p 38 of the Appeal Record)

[27] Based on the above observation made by the learned trial judge, I am of the view that he was justified in the circumstances of the case to refuse an adjournment. The learned trial judge cannot be faulted for this. It is the duty of counsel appearing

for the respective parties to fully prepare their cases and assist the court in the smooth conduct of the trial without the unnecessary interruptions of adjournment.

CONCLUSION

[28] For the above stated reasons, I would accordingly dismiss the defendant's appeal with costs and order that the deposit be paid to the plaintiffs on account of taxed costs.

[29] My learned brothers, Mokhtar Sidin JCA and Azmel JCA (now FCJ) had seen this judgment in the draft and have expressed their agreement.

Appeal dismissed.

Reported by Sally Kee